STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2006
v	No. 261569 Oakland Circuit Court
GEORGE LEE HOOPER, Defendant-Appellant.	LC No. 2004-198333-FH

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

Defendant first argues on appeal that he was denied his constitutional right of confrontation because inadmissible hearsay evidence was presented to the jury. We disagree. We review this unpreserved claim of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

In *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United State Supreme Court held that the Confrontation Clause requires that testimonial evidence against a defendant only be admitted if the declarant was unavailable and the defendant had a previous opportunity for cross-examination. But, testimonial statements that are used for a purpose other than to establish the truth of the matter asserted are not barred. *Id*. at 59; *People v McPherson*, 263 Mich App 124, 134; 687 NW2d 370 (2004).

Here, Officer Dale Brown testified that he was dispatched to the scene of the incident after a gas station clerk called 911 and said that a woman was at the station screaming for help because someone had dumped gasoline all over her and her vehicle. Defendant claims that this testimony constituted inadmissible hearsay and violated his right to confront the witnesses against him because the gas station clerk did not testify at trial. But, read in context, the testimony was not offered to prove the truth of the information, *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003); it was offered to establish the background facts of how and why Officer Brown became involved in the incident. See *People v Jackson*, 113 Mich App

620, 624; 318 NW2d 495 (1982). Therefore, the admission of the statement did not violate defendant's confrontation rights.[1] Accordingly, plain error was not established.

Next, defendant argues that he was denied his right to a fair trial because the trial court allowed into evidence the victim's prior consistent statement, which is hearsay evidence. We disagree. Because defendant did not preserve this issue for appellate review, our review is for plain error affecting his substantial rights. *Carines, supra*.

Under MRE 801(d)(1)(B), a prior consistent statement is not hearsay if the declarant testifies at trial, is subject to cross-examination regarding the statement, and such statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. See *People v Fisher*, 220 Mich App 133, 154; 559 NW2d 318 (1996). Here, Officer Brown testified regarding his conversation with the victim, which took place at the gas station immediately after the incident. The victim had told the officer that defendant poured gasoline all over her while telling her that he was going to kill her. The defense theory presented during opening statements, however, was that the victim was lying and that, indeed, she was the one who poured gasoline on defendant and threatened to kill him.

We conclude that the contested statement was admissible because it was not hearsay. The victim's trial testimony was consistent with what she had told Officer Brown immediately after the incident—while soaked in gasoline, she was subject to cross-examination regarding the statement, and the statement rebutted the implied or express charge against the victim of recent fabrication or improper influence or motive. See *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000). However, even if the disputed testimony was improperly admitted, we would conclude that defendant failed to establish plain error that was outcome determinative in light of the other properly admitted evidence. See *Carines, supra*.

Next, defendant argues that the prosecution introduced prior bad acts evidence without meeting the necessary requirements for admission and that his counsel was ineffective for failing to object to this evidence. We disagree with both claims. We review defendant's unpreserved issue of improper admission of evidence for plain error. *id.* Because an evidentiary hearing was not conducted, review of defendant's ineffective assistance of counsel claim is limited to the facts on the record. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

During the prosecutor's direct examination of the victim, the prosecutor questioned her as to what initiated the incident. The victim replied that defendant had wanted to resume their dating relationship and she declined his invitation which "upset" defendant. The prosecutor then asked for clarification, i.e., he asked "And when you say he got upset, what made you believe that?" To which the victim replied, "Because he said—he started saying that all the women that he had sent him to prison and lied on him and stuff like that." Defendant complains that this

[1] For the same reason, we also reject defendant's claim that this statement constituted an inadmissible prior consistent statement. See *McLaughlin, supra*.

testimony violated MRE 404(b) and impermissibly informed the jury that defendant had been incarcerated for violence against women in the past.

MRE 404(b) does prohibit the admission of other acts evidence "to prove the character of a person in order to show action in conformity therewith." But, that defendant was previously incarcerated for violence against women was not solicited by the prosecutor; it was merely a brief, nonresponsive, and volunteered answer to a proper question. Thus, the challenged testimony does not implicate MRE 404(b) and did not establish plain error warranting reversal. See *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Defendant's claim that his trial counsel was ineffective for failing to object to this purported MRE 404(b) testimony is also without merit. To establish a claim of ineffective assistance of counsel a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Here, defendant has not shown that trial counsel's failure to object to the testimony was anything but reasonable trial strategy. Trial counsel likely elected not to object to the victim's statement to avoid any unnecessary and further attention to this brief testimony. We will not substitute our judgment for that of defendant's counsel on matters of trial strategy. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Thus, defendant's ineffective assistance of counsel claim is without merit.

Next, defendant argues that the cumulative effect of the errors asserted in the previous issues denied him a fair trial. Because no errors were found, this issue is without merit. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Finally, we reject defendant's claim that his sentence violates the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), which held that factual determinations underlying the enhancement of sentencing maximums be made by a jury. Our Supreme Court and this Court have concluded that *Blakely* does not apply to sentences imposed in Michigan. *People v Drohan*, 475 Mich 140, 159; 715 NW2d 778 (2006); *People v Endres*, 269 Mich App 414, 423; 711 NW2d 398 (2006).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter